THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 48 O. S. / 39 N. S. } FEBRUARY, 1900. NO. 2.

THE EVOLUTION OF A STRANGER'S RIGHTS, WITH SPECIAL REFERENCE TO PENNSYLVANIA STATUTE LAW.

The rights and privileges which a citizen of one country may enjoy while sojourning in another, is an interesting study, though less thought about and of much less importance than formerly. While a stranger in ancient times was, *ipso facto*, an enemy, and was treated as such, this truly barbarous rule has so far been abrogated in modern civilized states that the entire subject has become unimportant in most countries for the reason that the property rights of an alien differ little if any from the rights of a citizen.

There are some states in this country, however, where an alien's right to acquire and hold real property is still to some extent limited, and Pennsylvania is one of these.

The subject, therefore, is yet of interest to a Pennsylvania lawyer, not only by reason of its historical value, but from a practical standpoint as well. A brief reference to the historical side of this question in leading up to the law of to-day as existing in this Commonwealth, will be not only interesting in itself, but may be of real value in interpreting more modern law.

Our first inquiry naturally is:

§ 1. *What is an alien?*—In very ancient times every stranger was an alien; and not only was he an alien, but an enemy, until he proved himself a friend.

The modern test of an alien, *i. e.*, place of birth, had little weight with the roving tribes who peopled Europe before the crystallization of its population into nations. The inquiry rather was as to the blood of the newcomer. If he was of another race or even of another tribe, he was an alien.

As the organization of states became more complete, the people who were living in certain territory and governed by certain laws, began to think that their exclusive rights among themselves were derived more from those facts than from kinship. The old idea of race, however, had a strong influence upon the laws governing who should become citizens, *vide* the treatment of the Jews in England, where they were kept out of the privileges of citizenship for a great many years, notwithstanding the fact that generations of them had been born on English soil and many Hebrew names were among those of England's most brilliant statesmen.

As far as is known, there were no very clear rules defining aliens until the thirteenth century. At that time an alien was defined to be, one born "beyond the ligeance of the king." Conversely, any one born in any territory, which at the time of his birth was subject to the king's authority, was a "natural born citizen."

The interpretation of the latter part of this law was settled in 1608 by Calvin's Case.[1] A child of Scottish parents had been born north of the line shortly after the accession of James VI. of Scotland to the throne of England. The question at issue was as to his rights of citizenship in England. It was decided that he was no alien, for the ligeance of the English king extended over Scotland at the moment of his birth. The circumstance that his parents are aliens will not affect the claim to citizenship of a child born on territory subject to the English king.

It was doubted at one time whether a child born abroad of English parents, would be a citizen of Great Britain.

[1] 7 Rep. 1.

Indeed, it was formerly held that he would not be, notwithstanding a curious decision which seems to have been rendered as early as 1290, allowing a son born abroad to claim the inheritance of his mother. It appeared that the wardship and marriage of two young ladies, sisters, had been granted to one Elyas de Rabayne. This man married one of the heiresses and sent the other abroad to be married, in order that her children might be aliens, thus intending to obtain the whole of the inheritance for himself. The foreign-born son was allowed by the court to claim his inheritance, although they declared the decision was to be no precedent for the future. It was made only to defeat the rascality of the guardian.

At any rate it was thought necessary to pass an act of Parliament providing that the children of English parents should be citizens of great Britain, even though they happened to be born beyond seas. An exception was made where a wife had gone beyond seas without the consent of her husband. In such a case the child was to be an alien.[1]

In America the English common law rules were of course in force until changed by statute. As Chancellor Kent points out in his Commentaries,[2] the act of Congress passed in 1802 was retrospective only in its provision that children of American parents, born beyond seas, should be deemed citizens of the United States. For a time it seems that this question rested for its solution solely upon the principles of common law, but by the act of 1855, amending the act of 1802, it is now definitely provided that all children of American citizens, although they may be born abroad, shall be citizens of the United States, except in cases where the fathers have never resided in this country. Then the right of citizenship is not conferred upon the children.

Some doubtful questions arose after the war of the Revolution, with regard to the *status* of persons who were in this country during the war, but who had removed to England during that time or shortly after.

By the English law any person resident in the American colonies prior to the Revolution and subject to the colonial

[1] 25 Edw. III.
[2] Lec. XXV, p. 52.

governments, became a citizen of the United States by the treaty of peace of 1783, by which England recognized the independence of the American colonies.

By our law all such persons became citizens by the Declaration of Independence in 1776. In *Inglis* v. *Sailor's Snug Harbour*,[1] this rule was laid down and the right of *antenati* in general defined. If a man was born before July 4, 1776, left this country before that date, took up his residence in Great Britain and never returned, he never acquired a right of citizenship in this country. If he remained here until after the Declaration of Independence, he thereby became a citizen; but if he was an infant at that time, he might thereafter exercise a right of election, thereby deciding his allegiance. If a man was born after the Declaration of Independence, there was no doubt that he would be a citizen. The English courts would decide the same, except that where our courts reckon *antenati* as those born before July 4, 1776, the British reckon from the treaty of peace in 1783.

An interesting question arose in Pennsylvania in 1810, in the case of *Jackson* v. *Burns*.[2] William Jackson died intestate in Pennsylvania in 1784. At the time of his death he was the owner in fee of certain lands. His title was disputed, but for the purposes of the case the court ignored that question, as the decision went on another ground.

The dispute arose between those claiming under John Jackson, the elder brother and heir-at-law of William Jackson, and the defendants, who claimed adversely to William Jackson.

The single point decided by the court was as to the capability of John Jackson to inherit from his brother.

John Jackson was born in Ireland before the Revolution, and had never been in this country. It was contended,

(1) That he had a legal claim to the land of his brother, by virtue of the treaty of peace between Great Britain and the United States.

(2) That he had a right by the common law.

The first point the court did not discuss, because it had

[1] 3 Pet. 99.
[2] 3 Binn. 75.

already been decided in the negative by the Supreme Court of the United States in the case of *Dawson's Lessee* v. *Godfrey*.[1]

That decision being a construction of a treaty by the court having the highest authority on such questions, was deemed binding upon the Pennsylvania Court. But the second point the court claimed the liberty to interpret for itself. Mr. Chief Justice Tilghman says:

"It remains then to be considered whether by the common law, as adopted in this State, John Jackson is an alien, incapable of taking land by descent.

"By the Declaration of Independence (fourth July, 1776), all political connection between Great Britain and the United States was dissolved. From that day the State of Pennsylvania became completely sovereign and independent; and the people of Great Britain and Pennsylvania had no other relations to each other than that of aliens; in war enemies, in peace friends. It has never been denied that this was the case so far as respected sovereignty and allegiance. But it has been contended that by the principles of the common law prevailing in both countries, certain rights flowing from former connection remained in the people of each; that the right of inheritance was unimpaired, in all those who were born before the dismemberment of the British empire, because the people of both countries were once bound in allegiance to the same sovereign. Considering this subject on the principle of reason, abstracted from authority, it would seem that the right of taking by descent, should be governed by the condition of the party at the time of the descent cast; because it is then that he is to enjoy the inheritance. The denial to aliens of the right of taking land by descent, must have been founded on political motives; on the danger of giving too much influence to persons, who so far from having a common interest with the people of the country, may have an interest directly opposed to them. Now this danger is not lessened, by the circumstance of the people of two countries having been once bound in bonds of common allegiance. I suspect, if the principle contended for could be traced to its source, it would be found to have originated in another principle, not compatible

[1] 4 Cr. 321.

with the Constitution of Pennsylvania, or her sister states; that is to say, that no man can, even for the most pressing reasons, divest himself of the allegiance under which he was born. . . . . I am informed, however, and believe it to be a fact, that by the law as now held in England, citizens of the United States, born before the Revolution, are capable of taking lands in England by descent. It is supposed by some that merely for that reason the courts of the United States should extend the same principle to the subjects of Great Britain. To this I cannot assent. I confess I should be mortified if my own country was surpassed by any on the globe in acts of humanity and benevolence. But it is evident that courts of justice have no right to regulate these matters. They are for the sovereign power of the nation. The judges must decide according to the law. The English adhere to their principle, that those who were born under the king's allegiance can never be considered so completely aliens as to be incapacitated from taking land by descent. But I apprehend that they restrict the right of inheritance to the case of persons either born under the king's allegiance, or being under it at the time of the descent cast. I presume they do not extend it to all those who have owed a temporary allegiance; for instance, to the inhabitants of a country conquered in war, and ceded by the treaty of peace to its former sovereign. This principle then, even if sound, cannot be applied to the circumstances of the United States; because, although there was a time when the people of England and the United States owed allegiance to the same sovereign, yet there never was a time when the people of England owed allegiance to the United States."

This extract, from Mr. Chief Justice Tilghman's opinion, amply explains the decision as to this point. It also refers to the law of Great Britain, which, rather strangely, holds that all persons born in America before the treaty of peace in 1783, never became aliens so as to lose their right to inherit.

Of course all of these questions are now at rest, but it is curious to see into what a tangle the courts were sometimes led when deciding as to the devolution of real property.

It is highly probable that cases of a similar nature will arise in the near future, *apropos* of our new acquisitions of territory.

§ 2. *Right of Expatriation.*—In close connection with the preceding discussion is the question of the right of a man to change his allegiance at will from one state to another.

This topic is important here because, if the right of expatriation be denied, we have the strange spectacle of one man being claimed as a subject by two different nations. It was the denial of this right by Great Britain, and her acts in accordance with her denial, that brought on the war of 1812. "Once an Englishman, always an Englishman," is the familiar expression that embodies this idea.

This principle that a natural born British citizen was incapable of divesting himself of his allegiance to the Crown, was never definitely abandoned by Great Britain until 1870, when Parliament passed an act regulating the naturalization of aliens, etc., and among other provisions, the following: "Any British subject who has at any time before, or may at any time after the passage of this act, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject, and be regarded as an alien." The act also makes certain provisions by which he may resume his allegiance within a limited time, should he so desire.

It was for a long time doubtful whether an American citizen could expatriate himself. It was thought by many that the right is an inalienable one, naturally belonging to every man; that it was so recognized in ancient times; and indeed this seems to be correct. Chancellor Kent points out in his Commentaries that Cicero considered it as "one of the firmest foundations of Roman liberty," that the Roman citizen could renounce his allegiance at pleasure. The argument continues that since the right of expatriation was anciently recognized to be an inalienable one, it was only denied to Englishmen by reason of the slavish practices introduced by the Feudal System, by which men became chained to the soil. That when the people emigrated to this country they left behind them all such practices and the laws that grew out of them. Finally, that the right of expatriation denied to Englishmen, revived to free Americans.

While this reasoning is theoretically satisfactory, and no doubt would have been recognized to be sound had we not been under the domination of the common law, yet the courts in this country expressed themselves as very doubtful whether the English law did not control us on that point.

The case of *Talbot* v. *Jansen*[1] decided in 1795 contains one of the most interesting discussions of this question that it has been my privilege to see. William Talbot had obtained and fitted out an American vessel as a sloop of war. He went to France and sold his vessel to Samuel Redick, a naturalized French citizen, but a born American. In pursuance of his original plan, he then took out naturalization papers for himself, took command of the vessel, having changed her name from "The Fairplay" to "*L'Ami de la Point-a-Petre*," and, in conjunction with another privateer of a similar character, captured a Dutch trading vessel, the Brigantine Magdalina, and took her into Charleston harbour as a prize.

The master of the vessel, Joost Jansen, filed a libel, alleging that his captors were citizens of the United States, with whom the United Netherlands were at peace, and asking for restitution.

One of the principal points at issue was the effect of William Talbot's emigration to France and his naturalization as a citizen of the French Republic.

Counsel for libellee very strongly argued that William Talbot became a French citizen by his act, and that consequently the United States courts had no jurisdiction over him or his prize. His words show the view which a large number of people in this country held concerning this matter.

He said "The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it. . . . It is the law of nature and of nature's god, pointing to 'the wide world

[1] 3 Dall, 133.

before us, where to chuse our place of rest and Providence our guide.' "

He drew a distinction between allegiance and citizenship—contending that in this country we have no such thing as allegiance but only citizenship, which is in the control of the individual so that he may discard it at will. "Allegiance," he said, was the product of the Feudal System and has no place in a free country.

He went on to discuss the manner in which one could exercise his right of expatriation and what acts would suffice to change his citizenship. He conceded that one could not expatriate himself in time of war, for this would be treason. And it would be "reprehensible" to do so at a time when his country is suffering from a great calamity. He concluded his argument by declaring that a man can not serve two masters, *i. e.*, cannot be a citizen of two states simultaneously, and since the United States had recognized the right of emigrants from other countries to become citizens of this, she had impliedly recognized the right of her own citizens to forswear their allegiance to her and to join themselves to other sovereignties.

On the other hand it was admitted that a citizen of the United States has a right to emigrate to other countries when he pleases, provided it is done *bona fide*, with good cause, and under the regulation of the laws; but it was insisted that in the present case the act was not done *bona fide*, but was contrary to law from the first, and, consequently, William Talbot never lost his character as an American citizen, even if he had acquired a citizenship in France.

The majority of the court delivered no opinion upon this particular point, but Mr. Justice Iredell in delivering his concurring opinion deals carefully with it.

He says: "The first point to be considered is,—

"Whether Talbot, at the time of his receiving the commission, and at the time of the capture, was a French citizen.

"This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps, it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject.

"That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize.

"The only difference of opinion is, as to the proper manner of executing this right. Some hold, that it is a natural, unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course, it must be left to every man's will and pleasure, to go off, when and in what manner he pleases.

"This opinion is deserving of more deference, because it appears to have the sanction of the Constitution of this State, if not of some other states in the Union. I must, however, presume to differ from it, for the following reasons:"

The reasons which the learned Justice gave are substantially two.

(1) Because the citizen owes certain duties to society; which has a right to claim him until these duties be fulfilled—therefore, the right of expatriation cannot be a natural right, for if it were so, society would have no claim at all upon the individual.

(2) If it be a natural, inalienable right, it should be exercised in time of war as well as in time of peace—yet all writers agree it cannot be exercised in time of war.

In this case the conduct of William Talbot plainly showed that his act was not *bona fide*, with intent to forever become a French citizen, consequently, on any ground, he had not in this case exempted himself from his responsibility as an American citizen.

It will be observed that this point was not considered necessary to the decision and the court as a whole shrank from deciding it.

The same question was treated in much the same manner

in the case of the *Trinidad and the St. Ander*,[1] decided in 1822. Mr. Chief Justice Marshall said: "Assuming, for the purpose of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear, that this cannot be done without a *bona fide* change of domicile under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court."

While no definite legislative act has ever been passed upon this question, the doubt indicated by the language of these decisions, to be in the minds of the court, was obviated by a declaratory act passed by Congress in 1868, declaring that "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof; and whereas it is necessary to public peace that this claim of perpetual allegiance should be promptly and finally disavowed, therefore, be it enacted, that any declaration, instruction, opinion, order, or decision of any officers of this government, which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

This act seems to have been accepted as an interpretation of the common law, and the right is now recognized to be a natural one.

Many puzzling questions often arise in connection with the change of citizenship from one country to another.

[1] 7 Wheat. 283.

When does the protection of the old government cease? When does the new attach? Is naturalization necessary, etc., etc.? Sometimes, also, a citizen of one country may leave under such circumstances that he owes a duty to his government. If he subsequently comes within the jurisdiction of that country, can he claim the protection of his new sovereign against the old? All these are questions that are arising occasionally at this day. Some of them have been decided, while others are still in doubt.

It is generally conceded that two things are necessary to release an individual absolutely from his allegiance to his native State.

(1) A *bona fide* change of domicile.

We have seen what is meant by this in the case of *Talbot* v. *Jansen*; and,

(2) Naturalization according to the laws of the country of his adoption.

When these two elements concur, then, by both English and American law, the citizen has become an alien.

While the subsidiary questions that arise in this connection are not, perhaps, directly in line with the subject of this paper, which is intended to deal more with the rights of aliens, yet it may not be uninteresting to notice one or two of the leading cases that have arisen.

Two of these questions will be briefly referred to here. (1) Supposing a man has become expatriated, by change of domicile and by naturalization, has he so completely severed his connection with the mother country that it no longer has any claim on him at all?

(2) May a citizen, under *any* circumstances, become expatriated without naturalization under a foreign State?

The first of these questions has given rise to the exchange of many diplomatic notes between this country and European countries, particularly Germany. Suppose a German emigrates to this country while under age, and becomes naturalized. He then returns to the Fatherland. Can he be held for military duty?

This precise state of facts arose in the case of Johann Knocke, a native of Prussia, who, after naturalization in this

country, returned to his native land. He was held by the Prussian Government for military service, and in his extremity went to Mr. Wheaton, then American Minister at Berlin, for advice. Mr. Wheaton advised him that he would be protected as long as he was in any other country but Prussia; "but having returned to the country of your birth, your native domicile and national character revert (so long as you remain in Prussian dominions), and you are bound to obey the laws as if you had never emigrated."

This unqualified statement strikes us as being a little startling and quite similar to the old English view. Very shortly after this incident the opposite view was expressed by the American diplomats; *i. e.*, that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever."

A middle ground has finally been settled upon, which is substantially that when a foreigner leaves some duty owing to his native country on his departure, he may, on his return, be held for that duty, but not for any other accruing after he had changed his domicile.

The case of Simon Toussig illustrates this point. He violated the laws of Austria while a native resident, and then to escape punishment went to the United States. After having declared his intention of becoming naturalized, he returned to Austria. He was arrested for his previous offences. The American consul refused to interfere, as the offences had been committed before Toussig had ever gone to America.

In such cases the jurisdiction of the home government does not attach until the emigrant has actually returned to its territory. Martin Kozta, a Hungarian refugee, after having in America declared his intention of becoming naturalized, went to Smyrna under the protection of a United States traveling pass. While there he was seized by some agents of the Austrian government, taken out in a boat and thrown into the sea. He was eventually picked up by an Austrian ship-of-war, "The Hussar." Austria refused to give Kozta up until the American ship-of-war, "The St. Louis," was sent to enforce the demand for his release. The American consul held that even allowing Austria's right to proceed

against the refugee upon his return to Austria, yet he was under the protection of the American flag, as long as he was on American or neutral soil, or on the high seas.

(2) As to the second subsidiary question in regard to whether a man may ever become expatriated without naturalization, only a word need be said.

It is generally recognized that there *may* be circumstances such that a man loses all claim to the protection of the United States even though he may be a natural born citizen and has never been naturalized in a foreign state.

To illustrate the point it will be sufficient to refer to the case of Francois A. Heinrich, who was born in New York. His parents were unnaturalized Austrians. When Francois was only three years old they returned to Austria, taking him with them, and neither child nor parents ever returned to this country. When he became of age Francois was conscripted into the Austrian army. He claimed exemption as an American citizen. The American consul refused to interfere for him, on the ground that he had completely expatriated himself. I venture to suggest that under the same circumstances a British citizen would have been protected by the Crown, but that, of course, is mere conjecture. This precedent seems to be an established one in the United States.

§ 3. *Rights of citizens domiciled abroad.*—A citizen of any country, who is temporarily residing abroad, is entitled to the protection of his home government in case his rights are interfered with.

If, however, he is residing permanently in a foreign country, the question arises, how far is he still to be deemed under the protection of his native flag and to what extent will his government interfere for him?

The British Foreign Office seems to hold that a permanent residence abroad in no wise detracts from the right of the citizen to the protection of the British Crown, and that that "protection" will be carried to the extent of interfering with the internal affairs of the country wherein her citizens are residents.

In America we have not yet carried our ideas of "protection" so far. The case of *Murray* v. *The Schooner Charming*

Betsey[1] arose out of an alleged violation of the Non-Intercourse Act of 1800, prohibiting American vessels from trading with France. It appeared that this schooner sailed from Baltimore, Md., to the island of St. Bartholomew's, where her cargo was disposed of, and thence to St. Thomas', where the vessel was sold to one Jared Shattuck, a native of Connecticut, but who had resided since his early youth in St. Thomas (a Danish dependency). He had married a wife, acquired property (some of which was only proper to be acquired by a Danish burgher), and had in every way manifested his desire to become a *bona fide* Danish subject, except that he had not become naturalized.

The schooner having been reladen, was bound for Guadaloupe when she was captured by a French privateer. A few days later she was captured by the United States ship "Constellation" and taken to the island of Martinique. From there the "Charming Betsey" was sent to the United States for adjudication.

One of the main points at issue was as to the *status* of Jared Shattuck—and particularly whether he was comprehended in the terms of the Non-Intercourse Act.

On this point, Mr. Chief Justice Marshall said: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration.

"Indeed, the very expressions of the Act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country,

[1] 2 Cr. 61.

although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection; and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance and, consequently, takes him out of the description of the Act.

"It is, therefore, the opinion of the court that the 'Charming Betsey,' with her cargo, being at the time of her recapture the *bona fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island."

This language would indicate that the United States is not prone to follow and protect a citizen who has voluntarily acquired a permanent domicile elsewhere.

A paragraph from an editor's note in Wheaton's International Law well sums up this subject:[1] "In 1873, Mr. Fish issued instructions to the American Minister in France, in which, after quoting the above dictum of Chief Justice Marshall, he thus explains the principles upon which the American Government now acts in protecting its subjects abroad. 'If on the one hand the Government assumes the duty of protecting his rights and privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction; if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction

[1] Boyd's Edition, § 151 n.

of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognized in the Fourteenth Amendment, and in the Act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

"'Each case as it arises must be decided on its own merits. In each the main fact to be determined will be this,—has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?

"'If there has not been, the applicant will be entitled to protection.'"

If the citizen is only temporarily abroad, it is understood that he must obey the laws of the country he is in, or else he is liable to the punishment usually inflicted by the law of that country.

§ 4. *Rights of Aliens in England and the United States.*

(*a*) *In General.*—It might seem more appropriate to discuss this subject under the head of "The Disability of Aliens," but I speak of the rights of aliens advisedly, because, strictly speaking, at common law an alien had no rights at all, hence a discussion of this subject more properly is an *epitome* of the privileges which have, from time to time, been conferred upon him.

As I have just indicated, originally, at common law, an alien had no civil rights whatever. This idea was the lineal descendant of the theory that all strangers are enemies.

Though this stranger was without rights, he was not free from liabilities, as he was obliged to conform to the English law. He was considered to have enough privilege if he were graciously permitted to exist within the boundaries of his Majesty's dominions. His taxes were even higher than the taxes of citizens.

Even foreign merchants had no legal rights until the passage of *Magna Charta* in 1215. By that great Act some few privileges were granted to them. Then came 16 Henry III., followed by the *Carta Mercatoria*, 31 Edw. I., which granted the first real concessions to this class of men who had done so much to make England great. Even merchants, however, were not allowed to own real property.

Probably by reason of the exceptions in favor of merchants, the rule was established that an alien could recover personal property in the courts. In the reign of Henry VI., a case seems to have carried this exception to the point of allowing an alien merchant to lease a house for the purposes of trade. But by Act of Parliament, 32 Hen. VIII., it was forbidden to any alien to hire or lease a house.

The law remained substantially in this condition until very recently in England—*i. e.*, that aliens could acquire and hold personal property—but not real. That is, they could not acquire real property at all by operation of law, and if they did by purchase, they held only *de facto*, liable to be dispossessed by the Crown by "office found" at any time, the Crown being considered to have an inherent right to expel all aliens and confiscate their property.

Why the distinction was made between personal and real property, has been the subject of some controversy. Blackstone assigns two reasons why no alien can acquire land by operation of law.

(1) That if this were allowed, since the owner of land owed allegiance to the king, this allegiance would be inconsistent with that which he owed to his own sovereign, and

(2) That such practices would subject the government to pernicious foreign influence.

As to the right of the Crown to confiscate land purchased by aliens, he says that this probably was to punish their presumption for attempting to acquire landed property—not a very valid reason it would seem to us.

It is suggested in Pollock and Maitland's "History of English Law"[1] that the true explanation is that the king's claim to seize all the land of aliens was a generalization from his right to seize the land of his French enemies. However that may have been there is no doubt that this right was often made use of as well as the right to expel, which latter was exercised for the last time in 1575, when all aliens were driven out. These rights of confiscation and expulsion have for many years been practically obsolete.

At the present time an alien in England may acquire, either

[1] P. 445.

by purchase or inheritance, and hold real and personal property in all respects the same as a native born citizen. These rights were conferred by the Act of Parliament of 1870, usually referred to as the "Naturalization Act." This act in the most complete manner, as far as regards property rights, obliterates the disability of alienage.

The laws of the United States are not yet so liberal towards aliens as the laws of England. The law relating to the holding of real property in the territories is fixed by act of Congress. By the act of 1887 it is made "unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer."

With respect to the right of aliens to hold property in the states the law is very much diversified, by reason of the fact that the regulation of the matter has been left to the states themselves. Presumptively, as the common law is applicable to all the states until altered by legislation, an alien cannot in any state take real property by operation of law, nor purchase an indefeasible title, unless this right has been given by legislation.

As to personal property, a general statement may be made that aliens may acquire and hold personal property, as if they were citizens, anywhere in the United States. Even in the absence of statutory provisions, it seems that they would be entitled to do so by the common law.

The law as to real property must be ascertained by a reference to the statute law of the various states. In the great majority of them the English rule has been adopted, often in language very similar to the English act, thus absolutely removing the disability of alienage. It is not the intention to examine the various state laws in this article, but to the general observation above, it may be added that in Oregon and California the Chinese are discriminated against; in others alien residents only can hold land, while in a few a declaration of an intention to become a citizen is a necessity.[1]

(b) *Pennsylvania Statute Law.*—At the time of the separation of the colonies from Great Britain, the Commonwealth of Pennsylvania owned a large tract of unimproved land. It was obviously to her interest to sell as much of this land as possible, to serve the double purpose of benefiting her financially and of improving the country. For this reason the policy of the government was, for several years immediately following 1776, shaped to the purpose of disposing of as much of this waste territory as possible, and not only to citizens but to foreigners. Hence we find early laws passed by the General Assembly more favorable to aliens than later ones.

The first act upon the subject was passed in 1778.[2] It confirmed the titles of persons who had, as heirs, devisees or assignees, derived title to land from aliens who had settled in Pennsylvania, although they had never been naturalized. It did not in any way enlarge the rights of aliens themselves to acquire or hold land.

The next year an act was passed which, for the period extending from the date of the act, February 11, 1789, until the first of January, 1792, authorized alien friends to purchase and hold lands the same as though they were citizens. This act was kept in force by various renewing acts until 1797, when the unimproved lands having been mostly disposed of by the Commonwealth, and the same urgent need for money not existing, it was suffered to expire. No act has since been passed in this state granting such wide privileges of purchase to aliens.

[1] See Stimson's American Statute Law, § 6012 *et seq.*

[2] 1 Sm. L. 461.

About the same time, 1791,[1] an act was passed which held out still further inducements to foreigners to settle and acquire land in this Commonwealth. It provided that no person should be incapable of taking land by inheritance or by devise by virtue of being an alien, thus guaranteeing to prospective purchasers the security of being able to leave their property to their families, even though the latter were still in the old country.

To briefly summarize the rights of aliens to hold real property in this Commonwealth I will divide the subject into three topics:

1. Capacity of Aliens to Acquire and Transmit Real Property by Devise or Descent.

As we have just seen, an alien may acquire property by devise or by descent as if he were a citizen, he is under no disability at all. This right must be distinguished from the capacity of an alien to leave property to his heirs or devisees. The act removes the disability to take; it does not affect the disability of an alien ancestor to transmit his property to his descendants or to his devisees. The fear of Blackstone's time, that the country would be subjected to pernicious foreign influence, or that the alien heir would be bound in allegiance to two sovereigns, seems to have lost its influence over the minds of legislators.

In *Rubeck* v. *Gardner*[2] it appeared that John Lawyer, an alien, had purchased lands in Pennsylvania and died.

The contest arose between his heirs and his widow, in whom the Legislature had vested the title, presuming it to have escheated to the Commonwealth. Mr. Justice Sergeant, in delivering the opinion of the court says: "The main question raised by the plaintiff in error is, on the due construction of the act of twenty-third February, 1791; did that act, as the plaintiff in error contends, authorize a citizen or subject of a foreign state to take lands in Pennsylvania by devise or descent, from an alien who had purchased them without having complied with the conditions imposed by the law?

[1] 3 Sm. L. 4.
[2] 7 Watts, 455.

It seems to me that this construction would be contrary to the letter of the act and its whole object and design. The act was passed, as the preamble recites, for the encouragement of persons purchasing lands in this State; and therefore must naturally refer to persons purchasing lawfully, and not to persons acquiring lands here contrary to law. It enables every person, being the citizen or subject of any foreign state, to acquire and take, by devise or descent, lands and other real property in this Commonwealth. A title by devise or descent is a derivative title; it can rise no higher than its source. The devisee or heir can only take what the ancestor had. But if the ancestor was an alien, and as such incompetent to take, and on his death his property escheated, there was nothing to descend or pass by will. If this act were to receive the construction contended for by the plaintiff, the heir or devisee of an alien would enjoy a greater and more entire estate than the alien himself had: whereas, it would seem to be the object of the act to enable a party to transmit an estate legally purchased."

The right to devise property acquired by purchase, or to leave it to their heirs under the intestate laws, has since been conferred upon aliens to a limited extent.

By the Act of February 10, 1807,[1] it was provided in addition to the power of purchase, that aliens who had declared their intention of becoming citizens, could hold real property in fee simple. This necessarily carried with it the right to leave it to their heirs.

The amount to be so held was limited by the following clause: "No alien or aliens shall be competent to purchase and hold more than five hundred acres until after he or they shall have actually become a citizen or citizens of the United States."

It might be suggested that no *alien* could hold more than five hundred acres even after he had become a citizen, inasmuch as he would no longer be an alien, but the meaning of the clause is clear enough.

In 1818 we have an act which again enlarges the power of aliens to transmit real property acquired by purchase to their

[1] 4 Sm. L. 362.

heirs. The act of March 24[1] gave all alien friends, whether they had declared their intention to become citizens or not, the right to hold a limited amount of real property "to their heirs and assigns forever, as fully, to all intents and purposes, as any natural born citizen may or can do." The amount of property allowed to be so purchased and held under the provisions of this act was limited to five thousand acres.

By the Act of May 1, 1861,[2] aliens may hold real estate to the amount of five thousand acres and of a value not exceeding twenty thousand dollars in net annual income. This act says nothing specifically about the *quantum* of estate to be so held, but as it does not repeal the act of 1818, and is consistent with it, there is no doubt that the same provisions as to that point would apply.

In the case of *Commonwealth* v. *Detwiler*,[3] Mr. Justice Williams said: "Even as to real estate, the distinction between a resident alien friend and a citizen has disappeared in Pennsylvania and nearly every other State in the Union." Yet we must remember that the power of an alien to hold land acquired by purchase is limited to five thousand acres in amount and twenty thousand dollars in annual value.

As to the capacity of an alien devisee or heir to leave the property so acquired to *his* heirs or devisees, there is no question. As he can thus acquire a fee simple, he can of course leave the same to his heirs. But if he purchases beyond the limit the excess would escheat to the commonwealth.

2. Capacity of Aliens to Acquire Real Property by Purchase.

This topic has already been touched upon. The act of February 10, 1807[4], was the first permanent act to be passed granting powers of purchase to aliens. As indicated above, this act limited the power it conferred to aliens who had declared their intention of becoming citizens, and the amount of land to five hundred acres.

[1] 7 Sm. L. 133.
[2] P. L. 433.
[3] 131 Pa. 614.
[4] Supra.

Then in 1814 an act[1] was passed permitting alien enemies who had declared an intention to become citizens, to "receive and hold" land, not exceeding two hundred acres in amount nor twenty thousand dollars in value.

In 1818[2] the limitations of the act of 1807 were loosened. The alien need not have declared his intention to become a citizen, and might purchase to the amount of five thousand acres.

The Act of 1861[3] limited the value to a net annual income of twenty thousand dollars.

The word "purchase," as appearing in our acts, is strictly construed, and does not include the acquisition of title by curtesy.[4] It is construed to mean purchase in the popular and not in the legal sense. Consequently there are still several means of acquiring title yet wholly denied to the alien.

This is the condition of the law in this State to-day.

For all practical purposes the alien friend is on the same footing as a citizen, but nevertheless there are limits to his purchasing power.

When Bonaparte, ex-King of Spain, came to this country to settle, he desired to purchase a large landed property, and was compelled to go over the river into New Jersey, when he would have preferred to acquire property in Pennsylvania. Our laws were not liberal enough for him. So we see that our restrictions have been of practical service in the past and may be in the future.

A great many acts confirmatory of previously acquired titles have been passed, but as they do not affect the capacity of an alien I shall not here refer to them.

3. Right of an Alien to Deal in Personal Property.

As I have before indicated there are no restrictions upon the right of an alien in this country to purchase, hold and dispose of personal property as he sees fit.

[1] March 22, 6 Sm. L. 178.
[2] Act of March 24, supra.
[3] May 1, supra.
[4] Reese *v.* Waters, 4 W. & S. 145.

In *Commonwealth* v. *Detwiler*[1] Mr. Justice Williams says:

"We think the right of all persons, not alien enemies, to buy and hold, use and enjoy, personal property, whether corporate stocks or articles of merchandise, is older than the Constitution, and that citizenship of the United States is not necessary to its exercise. . . . In Pennsylvania, therefore, a resident alien friend can deal as freely in all forms of property, whether personal or real, 'to all intents and purposes as any natural born citizen or citizens may or can do.' He may embark in business, become a stockholder in a joint-stock association or corporation, become a manager or director, when not expressly made ineligible, and use, enjoy, control and direct his property, of whatever nature or kind, in the same manner as any natural-born citizen may do."

Thomas Raeburn White.

[1] Supra.